

Chief Judge Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

v.

HUAWEI DEVICE CO., LTD., and
HUAWEI DEVICE USA, INC.,

Defendants.

No. 19-CR-010

**DEFENDANTS' MOTION TO
DISMISS COUNT TEN FOR
FAILURE TO STATE AN OFFENSE
AND LACK OF SPECIFICITY, OR
IN THE ALTERNATIVE, FOR A
BILL OF PARTICULARS**

**NOTE ON MOTION CALENDAR:
August 9, 2019**

ORAL ARGUMENT REQUESTED

Defendants Huawei Device Co., Ltd. ("Huawei China"), and Huawei Device USA, Inc. ("Huawei USA") (collectively, "Huawei Device"), through counsel, respectfully move to dismiss Count Ten, pursuant to Fed. R. Crim. P. 12(b)(3)(B), for failure to state an offense and lack of specificity. Specifically, the Indictment fails to allege that Huawei Device acted with corrupt intent or that any of the alleged obstructive acts have a nexus to an official proceeding. Alternatively, if the Court declines to dismiss Count Ten, Huawei Device respectfully moves, pursuant to Fed. R. Crim. P. 7(f), for a bill of particulars specifying the factual basis for the allegations in Count Ten.

INTRODUCTION

The Court should dismiss Count Ten for failure to state an offense and lack of specificity. Such an obstruction charge requires that (1) the defendant act with corrupt intent, and (2) the obstructive acts have a nexus to an official proceeding. Yet, Count Ten does not allege any specific facts to establish these critical elements. Instead, the Indictment contains only bald legal conclusions that Huawei Device was “concerned” about potential civil litigation and a criminal investigation at the time. Because Count Ten fails to provide Huawei Device with a meaningful understanding of the “essential facts constituting the offense charged,” it must be dismissed. Fed. R. Crim. P. 7(c)(1). Alternatively, if the Court declines to dismiss Count Ten, it should require bill of particulars specifying the Indictment’s vague and conclusory assertions regarding the alleged obstruction of justice.

BACKGROUND

The Indictment charges Huawei Device with theft of trade secrets conspiracy (Count One), attempted theft of trade secrets (Count Two), wire fraud (Counts Three to Nine), and obstruction of justice (Count Ten). Count One includes extensive allegations regarding T-Mobile, the Tappy Robot System, the relationship between T-Mobile and Huawei Device, and the alleged theft of trade secrets from T-Mobile. Ind. ¶¶ 2-49. The Indictment’s other counts are much less detailed. *See* Ind. ¶¶ 51-52; Ind. ¶¶ 53-63; Ind. ¶¶ 64-65. To be sure, the other counts incorporate the factual allegations of Count One by reference, Ind. ¶¶ 51, 53, 64, but the additional counts include little to no specific factual allegations.

Count Ten, which is particularly threadbare, charges that Huawei Device violated 18 U.S.C. § 1512(c)(2) when it allegedly “attempted to corruptly obstruct, influence, and impede an official proceeding, that is, the proceedings in *T-Mobile USA, Inc. v. Huawei Device USA, Inc.*, C14-1351RAJ . . . ; and Federal grand jury proceedings in the Western District of Washington.”

Ind. ¶ 65. Count Ten merely tracks the text of the underlying statute. 18 U.S.C. § 1512(c)(2) (“[w]hoever corruptly . . . obstructs, influences, or impedes any official proceeding, or attempts to do so”).

Count Ten appears to be based on Section E of Count One. Ind. ¶ 37. That section alleges that “T-Mobile’s discovery of the theft of the robot part and F.W.’s unauthorized access of the laboratory caused great and immediate concern for [Huawei Device] for several reasons.” Ind. ¶ 37. In addition to the “concern[] that T-Mobile would terminate its business relationship with” Huawei Device, Huawei Device was also allegedly “concerned about the potential for federal civil litigation” and “concerned that T-Mobile would refer the matter to federal law enforcement authorities, prompting a Federal grand jury investigation.” Ind. ¶ 37.¹

Count One also alleges that Huawei Device “attempted to affirmatively mislead T-Mobile about what had happened in T-Mobile’s laboratory,” including through an internal investigation, the investigation’s findings, during T-Mobile’s interview of two Huawei Device employees, and in communications with T-Mobile. Ind. ¶¶ 37-46. The description of Huawei Device’s internal investigation and communications with T-Mobile (Ind. ¶¶ 39-45), which occurred between June and October 2013, does not allege that anyone at Huawei Device discussed or was otherwise focused on potential civil litigation or a grand jury investigation. The first reference to potential civil litigation in the Indictment occurred seven months later, in May 2014, when T-Mobile allegedly sent a legal demand letter to Huawei Device threatening

¹ The Indictment also alleges that Huawei Device was “concerned about additional harm to Huawei’s reputation”—purportedly because Huawei Device had “already been the subject of negative publicity regarding the company’s past practice of misappropriating proprietary business information and technology.” Ind. ¶ 38. Huawei Device is separately moving to strike this irrelevant and prejudicial paragraph from the Indictment and to exclude any such evidence from trial.

litigation to which Huawei Device's in-house counsel responded. Ind. ¶ 46. The narrative allegations contain no reference to any potential grand jury investigation.

ARGUMENT

I. The Court Should Dismiss Count Ten for Failure to State an Offense and for Lack of Specificity.

A defendant is denied the constitutional right to a fair trial when the government fails to provide notice of the charges against which the defendant must defend. *See Russell v. United States*, 369 U.S. 749, 760-61 (1962). Here, Count Ten fails to allege with specificity the key elements of the obstruction of justice offense: corrupt intent and a nexus to an official proceeding. It is not enough simply to make naked assertions that do not address each of the elements of the charged offense. Allowing the threadbare obstruction charge in Count Ten to proceed would (1) undermine Huawei Device's ability to understand the nature of the charges against it and to prepare a defense, (2) create the danger of surprise at trial, and (3) prevent Huawei Device from pleading jeopardy against a subsequent prosecution. *United States v. Ayers*, 924 F.2d 1468, 1483 (9th Cir. 1991). For these reasons, the Court should dismiss Count Ten for failure to state a claim and for lack of specificity.

A. Legal Standards

A defendant may move to dismiss an indictment where the indictment "fail[s] to state an offense." Fed. R. Crim. P. 12(b)(3)(B)(v). An indictment must contain a "plain, concise, and definite written statement of the essential facts constituting the offense charged." Fed. R. Crim. P. 7(c)(1). An indictment must allege sufficient facts (1) to enable the defendant to prepare a defense, (2) to ensure that the defendant is prosecuted on the basis of facts presented to the grand jury, (3) to enable the defendant to plead jeopardy against a later prosecution, and (4) to inform the court of the facts alleged so that it can determine the sufficiency of the charge. *United States v. Cecil*, 608 F.2d 1294, 1296 (9th Cir. 1979) (per curiam); *see also United States v. King*, 587

1 F.2d 956, 963 (9th Cir. 1978) (“The failure of an indictment to detail each element of the charged
2 offense generally constitutes a fatal defect.”).

3 **B. Corrupt Intent Is an Essential Element of Count Ten.**

4 Corrupt intent is an essential element of the obstruction charge alleged in Count Ten.
5 Count Ten charges Huawei Device with obstruction of justice in violation of 18 U.S.C.
6 § 1512(c)(2), which prohibits “corruptly . . . obstruct[ing], influenc[ing], or impeded[ing] any
7 official proceeding.” 18 U.S.C. § 1512(c)(2). The Ninth Circuit has not defined the specific
8 parameters of corrupt intent in the context of Section 1512(c). *United States v. Watters*, 717 F.3d
9 733, 735 (9th Cir. 2013). But in interpreting a different section of the same obstruction statute
10 charged here—Section 1512(b)—the Supreme Court interpreted “corruptly” to mean “wrongful,
11 immoral, depraved, or evil” and held that acting “knowingly . . . corruptly” as defined in Section
12 1512(6) requires “conscious[ness] of wrongdoing.” *Arthur Andersen LLP v. United States*, 544
13 U.S. 696, 705-06 (2005); *see also United States v. Gordon*, 710 F.3d 1124, 1151 (10th Cir. 2013)
14 (corrupt intent under Section 1512(c)(2) means to “act[] with an improper purpose and to engage
15 in conduct knowingly and dishonestly with the specific intent to subvert, impede or obstruct” the
16 relevant proceeding) (some quotation marks omitted).

17 Thus, for purposes of Section 1512, conduct is not unlawful unless it is undertaken with a
18 corrupt intent. *See United States v. Doss*, 630 F.3d 1181, 1191 (9th Cir. 2011), *as amended on*
19 *reh’g in part* (Mar. 15, 2011) (reversing witness tampering conviction under 18 U.S.C. § 1512(b)
20 where the defendant simply “appealed to his wife to exercise her marital privilege not to testify
21 against him”); *United States v. Liew*, 856 F.3d 585, 603 (9th Cir. 2017) (reversing convictions
22 under 18 U.S.C. § 1512(c) where filing of a purportedly false answer in a civil proceeding was
23 “tantamount to a general denial of legal liability”). In other words, without evidence of
24 consciousness of wrongdoing and specific intent to obstruct justice, actions to influence others
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are not criminal obstruction, even if the acts affected an official proceeding. Corrupt intent is a key element of the obstruction charge, which must be alleged and proved.

C. A Nexus to an Official Proceeding Is an Essential Element of Count Ten.

A “nexus” between the allegedly obstructive acts and an official proceeding is an essential element of the obstruction charge alleged in Count Ten. Section 1512(c)(2) requires that the obstructive conduct be undertaken in connection with (*i.e.*, to have a nexus to) an “official proceeding.” 18 U.S.C. § 1512(c)(2).

The Supreme Court has consistently held that obstruction statutes require a nexus between the obstructive conduct and an official proceeding. For instance, the Supreme Court has held that 18 U.S.C. § 1503 requires a “nexus” between the obstructive act and an official proceeding showing “that the act [had] a relationship in time, causation, or logic with the judicial proceeding.” *United States v. Aguilar*, 515 U.S. 593, 599 (1995). Similarly, the Supreme Court applied a nexus requirement to Section 1512(b)(2)(A), concluding that the statute did not apply “when [the defendant] does not have in contemplation any particular official proceeding in which those documents might be material.” *Arthur Andersen*, 544 U.S. at 708. Most recently, the Supreme Court held that a defendant could be convicted under the omnibus obstruction clause of the Internal Revenue Code (26 U.S.C. § 7212(a)) only if “there is a ‘nexus’ between the defendant’s conduct and a particular administrative proceeding.” *Marinello v. United States*, 138 S. Ct. 1101, 1109 (2018).

The Ninth Circuit has not explicitly held that Section 1512(c)(2) includes a nexus requirement.² But every other circuit to consider the issue has held that Section 1512(c)(2)

² In an unpublished decision, the Ninth Circuit stated it “ha[d] not ruled on whether 18 U.S.C. § 1512(c)(2) contains a nexus requirement to an official proceeding,” and declined to decide the issue. *United States v. Liang*, 727 F. App’x 927, 929 n.1 (9th Cir. 2018) (per curiam). In another case, the Ninth Circuit suggested in dicta that Section 1512(c)(2) included a nexus

1 includes a nexus requirement. *See United States v. Young*, 916 F.3d 368, 386 (4th Cir. 2019)
 2 (collecting cases and concluding that no circuit has rejected the application of the nexus
 3 requirement to Section 1512(c)(2)).³ Thus, under existing precedent, “the government must
 4 prove that such a proceeding was reasonably foreseeable to the defendant” and “that there was a
 5 ‘nexus’ between the defendant’s conduct and the pending, or foreseeable, official proceeding.”
 6 *United States v. Martinez*, 862 F.3d 223, 237 (2d Cir. 2017), *vacated on other grounds sub nom.*
 7 *Rodriguez v. United States*, -- S. Ct. ---, 2019 WL 2649795, at *1 (June 28, 2019).

9 As an essential element of Section 1512(c)(2), the nexus requirement must be alleged in
 10 the Indictment. The Ninth Circuit has not specifically addressed the question of whether the
 11 nexus requirement must be alleged in an indictment. While two unreported decisions from the
 12 Southern District of California concluded that the nexus requirement must be proven at trial, but
 13 need not be alleged in the indictment,⁴ those non-binding decisions fail to grapple with
 14 longstanding Supreme Court precedent that an indictment must set forth all elements of an
 15 offense. A more recent decision from the District of Alaska persuasively held that the nexus
 16 element must be alleged in the indictment. *See United States v. Lawson*, No. 16-0121, 2018 WL
 17 3375170 (D. Alaska July 5, 2018), *report and recommendation adopted*, 2018 WL 3370517 (D.
 18 Alaska July 10, 2018).

21 requirement. *United States v. Ermoian*, 752 F.3d 1165, 1172 (9th Cir. 2013), as amended (Aug.
 22 28, 2013) (concluding that interpreting the obstruction statute to “reach so far back as to cover
 23 conduct that occurred even pre-criminal-investigation” “would be in tension with Supreme Court
 precedent requiring a nexus between the obstructive act and criminal proceedings in court”).

24 ³ *See also United States v. Petruk*, 781 F.3d 438, 445 (8th Cir. 2015); *United States v.*
 25 *Tyler*, 732 F.3d 241, 249-50 (3d Cir. 2013); *United States v. Bennett*, 664 F.3d 997, 1013 (5th
 26 Cir. 2011), *vacated on other grounds*, 567 U.S. 950 (2012); *United States v. Friske*, 640 F.3d
 1288, 1292 (11th Cir. 2011); *United States v. Phillips*, 583 F.3d 1261, 1263-64 (10th Cir. 2009);
United States v. Reich, 479 F.3d 179, 186 (2d Cir. 2007) (Sotomayor, J.).

27 ⁴ *See United States v. Meza*, No. 15-3175, 2017 WL 1371102 (S.D. Cal. Apr. 7, 2017);
 28 *United States v. Brimager*, No. 13-02381, 2014 WL 1515867 (S.D. Cal. Apr. 17, 2014).

In *Lawson*, where the defendant was charged with obstruction in violation of 26 U.S.C. § 7212(a), the court relied on *Marinello* and held that the nexus requirement was an essential element of the offense. *Id.* at *1-5. Because the indictment failed to allege that several of the charged obstructive acts had any nexus to an administrative proceeding, the court dismissed the count unless the government agreed to strike those obstructive acts. *Id.* at *5; *see also United States v. Genao*, 343 F.3d 578, 585 (2d Cir. 2003) (“We hold that the indictment in the instant case does not set forth a sufficient nexus between Genao’s false statements and a federal judicial proceeding so as to establish a violation of § 1503.”). As in *Lawson*, the nexus requirement is an essential element of the obstruction charge in Count Ten that must be alleged in the Indictment.

D. The Indictment Fails to Allege the Corrupt Intent and Nexus Elements with Specificity.

The first requirement of the constitutional right to a fair trial is notice of the charges against which the accused must defend. *See Russell v. United States*, 369 U.S. 749, 760-61 (1962) (right to notice is rooted in Sixth Amendment’s Notice Clause, Fifth Amendment’s Due Process Clause, and Fifth Amendment’s Grand Jury Clause); *see also Bousley v. United States*, 523 U.S. 614, 618 (1998). In addition to alleging the elements of the charged offenses, an indictment must “apprise the defendant *with reasonable certainty* of the nature of the accusation against him” and ensure that the government is not “free to roam at large.” *Russell*, 369 U.S. at 765, 768 (quotations omitted; emphasis added). “[A]ll the material facts and circumstances embraced in the definition of the offence must be stated, or the indictment will be defective.” *United States v. Hess*, 124 U.S. 483, 486 (1888).

Where an indictment tracks the generic language of the statute, it will state an offense *only* if it is “accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.” *Id.* at 487. Although the government “need not allege its theory of the case or supporting

1 evidence,” an indictment must allege the ““essential facts necessary to apprise a defendant of the
2 crime charged.”” *United States v. Buckley*, 689 F.2d 893, 897 (9th Cir. 1982) (quoting *United*
3 *States v. Markee*, 425 F.2d 1043, 1047-48 (9th Cir. 1970)). Count Ten does not clear that
4 threshold. Aside from listing without explanation the start and end dates of the alleged
5 obstruction and the two official proceedings at issue, the threadbare allegations in Count Ten
6 simply track the statute. Ind. ¶ 65. Moreover, none of the narrative allegations incorporated in
7 Count Ten allege with specificity that Huawei Device acted with corrupt intent and with a nexus
8 to an official proceeding.

10 The Indictment includes several conclusory statements that provide the only possible
11 nexus between Huawei Device’s actions and any official proceedings—*i.e.*, that Huawei Device
12 was “*concerned* about the potential for federal civil litigation” and that Huawei Device was
13 “*concerned* that T-Mobile would refer the matter to federal law enforcement authorities,
14 prompting a Federal grand jury investigation” Ind. ¶ 37 (emphasis added). These are pure
15 legal conclusions, not factual allegations. The government could presumably allege identical
16 “concerns” on the part of every participant in every business dispute. Surely, such conclusory
17 statements, untethered to any specific factual allegations, are insufficient to plead the required
18 nexus. Repeatedly stating that Huawei Device was “concerned,” without factual basis or
19 specificity, does not descend to the particulars necessary to put Huawei Device on notice of the
20 charge against it. *Russell*, 369 U.S. at 765; *Buckley*, 689 F.2d at 897. Thus, the allegations in
21 paragraph 37 are not sufficiently specific to sustain the charge in Count Ten.

24 Likewise, the allegation that T-Mobile eventually threatened Huawei Device with a civil
25 lawsuit cannot establish the required elements of corrupt intent and nexus to an official
26 proceeding for acts that long preceded that threat. The Indictment alleges that T-Mobile sent a
27 legal demand letter to Huawei Device on May 5, 2014, to which Huawei Device’s in-house
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counsel responded later that month, “reiterate[ing]” certain allegedly false representations that Huawei Device had made several months earlier, before any threatened official proceeding. The core allegations related to Huawei Device’s purported “cover-up” took place at least six months earlier. Ind. ¶ 46. This demand letter post-dating the earlier alleged acts of obstruction by six months or more cannot establish Huawei Device’s corrupt intent to obstruct justice or the requisite nexus.

For the reasons set forth above, the Court should dismiss Count Ten because it fails to state an offense and lacks specificity.

II. In the Alternative, The Court Should Order the Government to Submit a Bill of Particulars.

An indictment that fails to set forth a sufficient factual basis for the charges must be dismissed, and it cannot be saved by a bill of particulars. *See Russell*, 369 U.S. at 770; *United States v. ORS, Inc.*, 997 F.2d 628, 631 n.5 (9th Cir. 1993); *Cecil*, 608 F.2d at 1296. Nonetheless, in the unlikely event that the Court declines to dismiss Count Ten, it should at a minimum order the government to provide a bill of particulars specifying the information sought in this motion.

While an unsatisfactory outcome here, the Court has discretion to “direct the government to file a bill of particulars.” Fed. R. Crim. P. 7(f). “[A] bill of particulars is appropriate where a defendant requires clarification in order to prepare a defense.” *United States v. Long*, 706 F.2d 1044, 1054 (9th Cir. 1983). Specifically, the purpose of a bill of particulars is (1) “to inform the defendant of the nature of the charge[s] against him with sufficient precision to enable him to prepare for trial,” (2) “to avoid or minimize the danger of surprise at the time of trial,” and (3) to enable a defendant “to plead his acquittal or conviction in bar of another prosecution for the same offense when the indictment itself is too vague, and indefinite for such purposes.” *United States v. Ayers*, 924 F.2d 1468, 1483 (9th Cir. 1991) (internal quotation marks and citation omitted).

On March 15, 2019, Huawei Device requested a bill of particulars from the government seeking, among other information, “the bases for the allegations that [Huawei Device] was ‘concerned’ ‘that T-Mobile would terminate its relationship with them,’ ‘about the potential for civil litigation,’ and ‘that T-Mobile would refer the matter to federal law enforcement authorities,’ including the identities of all individuals who expressed such ‘concern.’” *See* Ex. A, Ltr. from James F. Hibey, et al. to Todd Greenberg, et al., at 2. The letter also requested specifics on “the manner in which [Huawei Device] attempted to obstruct” the official proceedings at issue. *Id.* at 3. On March 29, 2019, the government declined to provide any of the requested particulars. *See* Ex. B, Ltr. from Thomas Woods, et al. to Brian Heberlig, et al.⁵

Huawei Device is entitled to know the particular allegations that form the basis of the charges against it. That includes each element of the charge. Count Ten’s vague and conclusory allegations do not specify which acts the grand jury believed were obstructive or which facts establish Huawei Device’s corrupt intent. Nor do the bald legal conclusions that Huawei Device was “concerned” about civil litigation and a grand jury investigation (Ind. ¶ 37) specify how any allegedly obstructive acts had a nexus to an official proceeding. At a minimum, a bill of particulars is required.

CONCLUSION

For the reasons set forth above, the Court should dismiss Count Ten for failure to state an offense and lack of specificity. Alternatively, the Court should order the government to provide a bill of particulars forthwith.

⁵ The government’s letter claims that a bill of particulars is not required if the government’s disclosures, including discovery, adequately advise the defendant of the nature of the charges. *See* Ex. B, at 1. Even if discovery could provide Huawei Device with an adequate understanding of the obstruction charge alleged in Count Ten, subsequent disclosures, including a bill of particulars, cannot save a faulty indictment. *Russell*, 369 U.S. at 770; *ORS*, 997 F.2d at 631 n.5; *Cecil*, 608 F.2d at 1296.

1 Dated: August 1, 2019

Respectfully submitted,

2
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CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED: August 1, 2019, at Seattle, Washington.

s/ Vassie Skoulis

Vassie Skoulis, Legal Assistant

**Exhibit A to Defendants’
Motion to Dismiss Count Ten
for Failure to State an Offense
and Lack of Specificity, or in
the Alternative, for a Bill of
Particulars**

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March 15, 2019

By Electronic Mail

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Re: *United States v. Huawei Device Co., Ltd., and Huawei Device USA, Inc.*,
Case No. 2:19-cr-00010-RSM (W.D. Wa.)
Defendants' Request for a Bill of Particulars re Indictment

Dear Counsel:

On behalf of Defendants Huawei Device Co., Ltd. ("Huawei China") and Huawei Device USA, Inc. ("Huawei USA") (collectively "Huawei"), we hereby request specification of certain allegations in the Indictment to permit Huawei to prepare a defense to the charges. We submit these requests in an effort to reach an agreement with the government short of motions practice under Federal Rule of Criminal Procedure 7(f).

Our specific requests regarding the allegations in the Indictment are as follows:

1. Please identify the "others known and unknown" with whom Huawei allegedly "conspired and agreed" to steal trade secrets belonging to T-Mobile. (§ 1).
2. Please identify the "someone other than T-Mobile" for whose economic benefit Huawei allegedly intended to convert the alleged trade secrets. (§§ 1, 52).
3. Please identify the bases for the allegation that Huawei conspired and agreed to steal T-Mobile's trade secrets "knowing that the offense would injure T-Mobile." (§§ 1, 52).

AUSA Todd Greenberg
AUSA Thomas M. Woods
March 15, 2019
Page 2



4. Please identify the “multiple inquiries about licensing or purchasing the Tappy system” that T-Mobile allegedly received, as well as T-Mobile’s declinations of such offers. (¶ 5).
5. Please identify the bases for the allegation that Huawei’s “phones were failing Tappy’s testing at a disproportionate rate compared to other suppliers’ phones.” (¶ 12).
6. Please identify the bases for the allegations that Huawei was “concerned” “that T-Mobile would terminate its relationship with them,” “about the potential for civil litigation,” and “that T-Mobile would refer the matter to federal law enforcement authorities,” including the identities of all individuals who expressed such “concern.” (¶ 37).
7. Please identify the bases for the allegations that Huawei as “concerned about additional harm to Huawei’s reputation,” including the identity of all individuals who expressed such “concern.” (¶ 38).
8. Please identify all “false and misleading statements” made by A.X. and F.W. in their interviews with T-Mobile security personnel. (¶ 39).
9. Please identify all “false and misleading statements” in the Investigation Report. (¶ 41).
10. Please identify all of the “multiple prior occasions” on which Huawei employees allegedly took unauthorized photographs of Tappy. (¶ 42).
11. Please identify all of the “numerous directives” Huawei China allegedly issued to Huawei USA referenced in this paragraph. (¶ 42).
12. Please identify specifically which aspects of the “Tappy robot system technology” are allegedly protected trade secrets. (¶ 49).
13. Please identify each allegedly false and fraudulent pretense, representation, promise, and concealment of material facts at issue in the wire fraud scheme alleged in Counts 3-9, in addition to the allegedly false pretense and representation that “only authorized activity would be conducted in the laboratory.” (¶¶ 54, 55).
14. Please identify all occasions that Huawei USA, on behalf of itself and Huawei China, allegedly “represented to T-Mobile . . . that they would conduct only authorized activity within the Tappy robot laboratory, while intending that their employees would obtain confidential technical information” referenced in this paragraph. (¶ 56).

AUSA Todd Greenberg
AUSA Thomas M. Woods
March 15, 2019
Page 3



15. Please identify all occasions that Huawei allegedly “represented to T-Mobile that they would conduct only authorized activity within the Tappy robot laboratory, and abide by the restrictions in the” NDAs, including the identity of all employees who made any such representation, referenced in this paragraph. (¶ 57).
16. Please identify all aspects of the “Investigation Report” with which Huawei allegedly “attempted to mislead T-Mobile,” including the identity of all employees engaged in any such alleged attempts. (¶ 62).
17. Please identify the date “on or after September 2, 2014” on which the alleged obstruction ended, including all actions allegedly taken after September 2, 2014 in furtherance of the alleged obstruction. (¶ 65).
18. Please identify the manner in which Huawei attempted to obstruct the proceedings in *T-Mobile USA, Inc. v. Huawei Device USA, Inc.*, C14-1351RAJ, and the Federal grand jury proceedings in the Western District of Washington concerning Huawei. (¶ 65).

Please advise us whether the government will provide the requested information so that we can determine whether it will be necessary to move for a bill of particulars. We are available to discuss this matter at your convenience. Thank you for your consideration.

Sincerely,

A handwritten signature in blue ink, appearing to read "J. Hibey", written over a horizontal line.

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**Exhibit B to Defendants’
Motion to Dismiss Count Ten
for Failure to State an Offense
and Lack of Specificity, or in
the Alternative, for a Bill of
Particulars**



United States Attorney
Western District of Washington

Please reply to:
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March 29, 2019

By Electronic Mail

Brian Heberlig, Esq.
James F. Hibey, Esq.
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Robert Westinghouse
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Re: *United States v. Huawei Device Co. et al.*
No. CR19-0010RSM, USDC, W.D. Washington

Dear Counsel:

We are in receipt of your letter, dated March 15, 2019, requesting a bill of particulars as to eighteen categories of information. We respectfully decline to answer the requests as both premature and unwarranted.

Under Ninth Circuit law, a bill of particulars is warranted only when the indictment, along with the government's disclosures, including discovery, fail to adequately advise the defendant of the nature of the charges. *See United States v. Giese*, 597 F.2d 1170, 1180 (9th Cir. 1979) ("Full discovery . . . obviates the need for a bill of particulars."). Your request for a bill of particulars was made prior to receiving any discovery from the government and therefore is premature. *See, e.g., United States v. Wittmer*, No. CR 312-004, 2012 WL 12896295, at *3 (S.D. Ga. Sept. 25, 2012) (denying motion for bill of particulars as premature because request could become moot after discovery production was complete); *United States v. Jianyu Huang*, No. CR 12-1246 WJ, 2014 WL 12796902, at *1 (D.N.M. Feb. 27, 2014); *United States v. Jackson*, No. CRIM 4:09CR066-P-S, 2009 WL 1690727, at *2 (N.D. Miss. June 16, 2009).

In addition, the indictment in this case more than adequately advises the defendants of the nature of the charges. The indictment spans twenty-eight pages, and provides a highly detailed factual description of the offenses. Moreover, the Ninth Circuit has disapproved of the specific type of requests that you make in your letter as being inappropriate for a bill of particulars. *See generally United States v. DiCesare*, 765 F.2d 890, 897-98 (9th Cir. 1985) (citing *United States*

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v. Long, 449 F.2d 288, 294–95 (8th Cir. 1971); *Wilkins v. United States*, 376 F.2d 552, 562–63 (5th Cir. 1967); *Cook v. United States*, 354 F.2d 529, 531 (9th Cir. 1965)).

Sincerely,

ANNETTE L. HAYES
First Assistant United States Attorney
(Acting Under Authority Conferred by
28 U.S.C. § 515)

/s Thomas M. Woods
TODD GREENBERG
THOMAS M. WOODS
SIDDHARTH VELAMOOR
Assistant United States Attorneys

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. 19-CR-010

UNITED STATES OF AMERICA,

v.

HUAWEI DEVICE CO., LTD., and
HUAWEI DEVICE USA, INC.,

Defendants.

**[PROPOSED] ORDER GRANTING
DEFENDANTS' MOTION TO
DISMISS COUNT TEN FOR
FAILURE TO STATE AN OFFENSE
AND LACK OF SPECIFICITY, OR
IN THE ALTERNATIVE, FOR A
BILL OF PARTICULARS**

The Court has reviewed Defendants Huawei Device Co., Ltd.'s ("Huawei China"), and Huawei Device USA, Inc.'s ("Huawei USA") (collectively, "Huawei Device") Motion to Dismiss Count Ten for Failure to State an Offense and Lack of Specificity, or in the Alternative, for a Bill of Particulars.

The Motion is granted for the reasons stated by Huawei Device.

Accordingly, [] Count Ten of the Indictment is dismissed, and the government shall file an amended version of the Indictment reflecting this Order; [] the government is hereby ordered to provide a bill of particulars specifying the information sought in the aforementioned motion.

IT IS SO ORDERED.

Ricardo S. Martinez
Chief United States District Judge